

**BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III**

**1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029**

In the Matter of:

Virginia Department of Transportation  
Richmond, Virginia

Respondent.

**ADMINISTRATIVE ORDER  
ON CONSENT**

Docket No. CWA-03-2015-0085DN

**I. PRELIMINARY STATEMENT and STATUTORY AUTHORITY**

1. EPA has made the following findings of fact and issues this Administrative Order on Consent (Consent Order) pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (EPA) under Section 309(a) of the Clean Water Act (CWA or Act), 33 U.S.C. § 1319(a). This authority has been delegated by the Administrator to the Regional Administrator of EPA Region III, and further delegated to the Director, Water Protection Division, Region III.

2. Section 309 of the Act, 33 U.S.C. § 1319(a), provides, *inter alia*, that whenever on the basis of any information available to him the Administrator finds that any person is in violation of any permit condition or limitation implementing certain CWA sections in a permit issued under Section 402 of the Act, 33 U.S.C. § 1342, he shall issue an Order requiring such person to comply with such section or requirement.

**II. FINDINGS of FACT and CONCLUSIONS OF LAW**

3. The Virginia Department of Transportation (VDOT), or "Respondent", is a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

4. At all times relevant to this Complaint, Respondent has owned and/or operated a municipal separate storm sewer system ("MS4") as that term is defined in 40 C.F.R. § 122.26(b)(8).

5. Respondent's MS4 is located within the geographic boundaries of the Commonwealth of Virginia.

6. Stormwater from VDOT's MS4 drains to the numerous rivers, creeks and tributaries within the Commonwealth of Virginia, which are considered "waters of the United States" within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7); 40 C.F.R. § 232.2; 40 C.F.R. § 122.2.

7. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant (other than dredged or fill material) from a point source into waters of the United States except in compliance with a permit issued pursuant to the National Pollutant Discharge Elimination System ("NPDES") program under Section 402 of the Act, 33 U.S.C. § 1342.

8. Section 402(a) of the Act, 33 U.S.C. § 1342(a), provides that the Administrator of EPA may issue permits under the NPDES program for the discharge of pollutants from point sources to waters of the United States. The discharges are subject to specific terms and conditions as prescribed in the permit.

9. "Discharge of a pollutant" includes "any addition of any pollutant or combination of pollutants to waters of the United States from any point source." 40 C.F.R. § 122.2.

10. "Storm water" is defined as "storm water runoff, snow melt runoff and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13).

11. The term "municipal separate storm sewer system" ("MS4") includes, "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains) owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States." 40 C.F.R. § 122.26(b)(8)(i).

12. The term "small municipal separate storm sewer system" or "small MS4" means "all separate storm sewers that are: (i) owned or operated by the United States, a State, city, town, borough...or other public body (created by or pursuant to State law) having jurisdiction over disposal of...storm water...;(and)(ii) Not defined as "large" or "medium" municipal separate storm sewer systems". 40 C.F.R. § 122.26(b)(16) and (17).

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13. An NPDES permit is required for discharges from small MS4s. Section 402(p)(2)(C) of the Act, 33 U.S.C. § 1342(p)(2)(C); 40 C.F.R. § 122.26(a), 40 C.F.R. § 122.21.

14. Pursuant to Section 402(b) of the Act, 33 U.S.C. § 1342(b), EPA authorized the Commonwealth of Virginia NPDES program on March 31, 1975. The Virginia Department of Environmental Quality (VADEQ) was authorized to issue general NPDES permits on April 20, 1991. On December 30, 2004, EPA approved the Commonwealth's request to transfer the issuance of general and individual NPDES permits from VADEQ to the Virginia Department of Conservation and Recreation (VDCR). On July 1, 2013 EPA approved the Commonwealth's request to transfer issuance of NPDES permits from VDCR to VADEQ.

15. Pursuant to Section 402(i) of the CWA, 33 U.S.C. § 1342(i), EPA retains its authority to take enforcement action within Virginia for NPDES permit violations.

16. On July 15, 2008, VDCR determined that discharges from VDOT's MS4 would be permitted under the General Permit for Discharges of Stormwater from Small Municipal Separate Storm Sewer Systems, General Permit No. VAR04 (MS4 General Permit) with an effective date of July 9, 2008.

17. An NPDES permit is also required for discharges of storm water associated with construction activities, as well as for stormwater discharges which Virginia or EPA determine to be a significant contributor of pollutants or that contributes to a violation of a water quality standard. Section 402(p)(2) of the Act, 33 U.S.C. § 1342(p)(2); 40 C.F.R. § 122.26(a), 40 C.F.R. § 122.21.

18. VDCR issued a General Permit for Discharges of Stormwater from Construction Activities (Construction General Permit or CGP), effective July 1, 2009, which authorized the VDOT to discharge stormwater from construction activities within Virginia in accordance with the requirements of the Construction General Permit.

19. On October 22 through October 26, 2012, representatives of EPA conducted an inspection of VDOT's MS4 program and NPDES construction program (EPA's October 2012 Inspection) at various VDOT locations within Virginia.

20. In March 2014, EPA issued Virginia Department of Transportation NPDES Municipal Separate Storm Sewer System (MS4) Program & NPDES Construction Program Inspection Report (Inspection Report).

21. VDOT received a copy of the Inspection Report which was sent by mail on March 24, 2014. VDOT prepared and submitted multiple responses to EPA following VDOT's receipt of the Inspection Report.

22. Based upon EPA's October 2012 Inspection, EPA identified four categories of violations, which it has concluded were violations of the MS4 General Permit and the CGP and Section 301 of the Act, 33 U.S.C. § 1311. This Consent Order addresses these categories and directs VDOT to take the corrective action described below to comply with MS4 General Permit and CGP.

23. Section II.B.3. of the MS4 General Permit requires VDOT to develop, implement and enforce a program to detect and eliminate illicit discharges into VDOT's MS4. Section II.B.3. also requires VDOT to develop and maintain an updated storm sewer system map, showing the location of all known outfalls of the VDOT MS4 including those physically connected to VDOT's MS4, to track the number of illicit discharges identified and provide a narrative on how they were controlled or eliminated, and to notify, in writing, any downstream regulated MS4 to which VDOT is physically connected.

24. During EPA's October 2012 Inspection, the EPA representatives found that: VDOT had not identified all of the known outfalls that ultimately discharged into waters of the United States; had not developed an updated storm sewer system map which included the location of all the known outfalls at the time of EPA's October 2012 Inspection; and that VDOT had not fully implemented its established protocol at the time of EPA's October 2012 Inspection for sending its inspection reports of verified illicit discharges to the appropriate MS4s that would be responsible for eliminating such an illicit discharge.

25. VDOT's failure to fully implement its program to detect and eliminate illicit discharges into the VDOT MS4 is a violation of Section II.B.3. of the MS4 General Permit.

26. Section II.B.5 of the MS4 General Permit requires that VDOT develop, implement and enforce procedures to address stormwater runoff to the VDOT MS4 from new development and redevelopment projects that disturb greater than or equal to one acre or equal to or greater than 2,500 square feet in areas of the jurisdictions designated as subject to the Chesapeake Bay Preservation Act, including projects less than one acre that are part of a larger common plan of development or sale, that discharge into VDOT's MS4. Section II.B.5.b. further requires VDOT to develop and implement strategies which include a combination of structural and/or nonstructural best management practices (BMPs) appropriate for the community. Section II.B.5.b.(5) of the MS4 General Permit requires VDOT to conduct site inspections of post construction stormwater management facilities and to enforce measures consistent with the Virginia Stormwater Management Act (VSMA). Section 4VAC50-60-200 B. of VSMA requires, at a minimum, that VDOT inspect post construction stormwater management facilities on an annual basis and after any storm which causes the capacity of the facility principal spillway to be exceeded.

27. At the time of EPA's October 2012 Inspection, VDOT reported that it owned and maintained approximately 618 post construction stormwater management facilities within its MS4. EPA examined VDOT's records of inspections of its post construction stormwater management facilities for the years 2010, 2011 and 2012. EPA found that VDOT's records of inspections for all of its post construction stormwater management facilities for each of the years 2010, 2011 and 2012 were incomplete in that there was not an annual record of inspections for each of its approximately 618 facilities for each of the years examined.

28. VDOT's failure to record annual inspections of all of its post construction stormwater management facilities for the years 2010, 2011 and 2012 is a violation of Section II.B.5. of the MS4 General Permit.

29. Section II.B.6. of the MS4 General Permit, "Pollution prevention/good housekeeping for municipal operations", requires VDOT to develop and implement an operation and maintenance program consistent with the MS4 Program Plan that includes a training component and has the ultimate goal of preventing or reducing pollutant runoff from VDOT's maintenance yards. VDOT's MS4 Program Plan, which was approved by VDCR in 2009 and which was thereby incorporated by reference as part of the MS4 General Permit governing VDOT's stormwater discharges, requires VDOT to conduct, at a minimum, annual inspections of District Facilities to ensure that pollution prevention practices are implemented, and that records of these facilities are to remain on file at the inspected facility. VDOT Part I, MS4 Program Plan, (page 6) "Action To Comply With General Permit".

30. During EPA's October 2012 Inspection, EPA inspected nine VDOT maintenance yards. During the inspections EPA found that the established protocols for pollution prevention and good housekeeping for maintenance yards were not effectively implemented at each maintenance yard prior to 2012

31. VDOT's failure to fully implement its program for pollution prevention at all of its maintenance facilities at the time of the October 2012 MS4 Inspection is a violation of Section II.B.6 of the MS4 General Permit.

32. Section II.B.4 of the MS4 General Permit, "Construction site stormwater runoff control", requires that VDOT develop, implement, and enforce procedures to reduce pollutants in any stormwater runoff to VDOT's MS4 from construction activities that result in a land disturbance of greater than or equal to one acre or equal to or greater than 2,500 square feet in all areas of the jurisdictions subject to the Chesapeake Bay Preservation Act. Such procedures must include requirements for construction site owners and operators to implement appropriate erosion

and sediment control best management practices as part of an erosion and sediment control plan that is consistent with Virginia's Erosion and Sediment Control Law, as well as procedures for site inspection and enforcement of control measures.

33. Section II. of Virginia's CGP requires that VDOT develop and implement a stormwater pollution prevention plan (SWPPP) for all construction activities covered by the CGP. Section II.A.3. of the CGP allows the SWPPP requirements to be fulfilled by incorporating by reference other State and local plans such as an erosion and sediment control (ESC) plan and a stormwater management plan. All SWPPPs must include controls to minimize pollutants from construction activities. Section II.D.4. of the CGP (inspections) requires that each inspection report include the corrective actions that were required to come into compliance with the CGP. In October 2009 VDCR authorized VDOT to implement its own construction program, with one of the conditions being that all VDOT land disturbing construction activities comply with the requirements of the Virginia Stormwater Management program (VSMP) permit regulations.

34. During EPA's October 2012 Inspection, EPA representatives visited eleven VDOT active construction sites. EPA found deficiencies at all eleven of the active construction sites, including failure to maintain erosion and sediment management controls and failure to take the required corrective actions at the construction sites, as well as deficiencies in the inspection reports maintained by VDOT for its construction activities.

35. VDOT's failure to maintain required erosion and sediment management controls at all of the active construction sites inspected by EPA during the October 2012 Inspection, failure to take corrective actions required to come into compliance with the CGP at all times at the construction sites, and failure to maintain accurate and complete records of its inspections of all of its construction sites is a violation of Section II.B.4 of the MS4 General Permit.

36. VDOT's failure to maintain required erosion and sediment management controls at all of the active construction sites inspected by EPA during the October 2012 MS4 Inspection, and failure to maintain accurate and complete records of its inspections of all of its construction sites is a violation of Section II. of the Construction General Permit.

37. Based upon EPA's October 2012 Inspection, EPA has concluded that Respondent's failures to: 1) fully implement its program to detect and eliminate illicit discharges; 2) provide readily-available annual inspection records of all of its post construction stormwater management facilities; 3) fully implements its program for pollution prevention at maintenance facilities; and 4) failure to maintain required erosion and sediment controls at all of its construction sites and record all such inspections; violate the MS4 General Permit, the Construction General Permit, and Section 301 of the Act, 33 U.S.C. § 1311.

**III. ORDER**

AND NOW, this 3rd day of June, 2015, pursuant to section 309(a) of the Act, 33 U.S.C. § 1319(a), having taken into account the seriousness of the violations and any good faith efforts by Respondent to comply with section 301(a) of the Act, Respondent is hereby ORDERED, pursuant to Section 309(a) to do the following:

38. Respondent shall take all actions necessary to comply with its current MS4 Permit, including: the development and implementation of a plan within 6 months of the effective date of this Order to come into compliance with its current permit, and submit this plan to EPA for comment. VDOT's plan should briefly describe program enhancements and changes in procedures for MS4 program oversight, and shall explain what VDOT is doing (or will do) to maintain full compliance with NPDES requirements at construction sites, to maintain full implementation of VDOT's illicit discharge program, to maintain full implementation of VDOT's program for inspecting permanent post construction stormwater management facilities, and to maintain full implementation of VDOT's program for pollution prevention at maintenance facilities.

39. In order to assure compliance with the MS4 General Permit and Construction General Permit, VDOT shall implement the following measures within 2 years. VDOT will not be allowed to take credit for any pollution reduction required under a TMDL or any MS4 permit requirement. VDOT shall provide preliminary designs and specifications for the following projects within 120 days of the effective date of this Order. VDOT shall provide documentation, including photographs as appropriate, for each significant step of each project every 120 days until project completion. If additional time is needed to deliver a project listed below, VDOT will be allowed to submit to EPA a request for an extension of time to complete a project. The request must contain a paragraph explaining the need for the time extension and the amount of additional time needed. EPA will respond within ten days of the receipt of VDOT's request.

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- a. Installation of two underground storage tanks (UST) to capture salt-laden stormwater at \$65,000 per unit both installed by December 30, 2016.
  - b. Installation and evaluation of seven drop inlet guards at maintenance facilities at \$3,000 per unit all installed by September 1, 2016
  - c. Acquisition of additional nine pounds of nutrient credits to reduce nutrients in Virginia's Chesapeake Bay basins at market price (\$10,430 per credit) that will be prohibited from future use on VDOT roadway projects purchased by May 1, 2015.
  - d. Construction of approximately 70,000 square feet of permeable pavement on a park and ride lot in the VDOT Salem District by May 1, 2017, at a projected cost of \$350,000.
40. All documents required by Paragraphs 38 and 39 of this Section shall be accompanied by a certification signed by a responsible VDOT officer, as defined in 40 CFR § 122.22(d), that reads as follows:

*I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.*

Signed   
Title Commissioner of Highways

All documents required herein shall be submitted to:

Chuck Schadel  
Enforcement Officer  
NPDES Enforcement Branch  
Mail Code (3WP42)  
U.S. EPA, Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029



**IV. GENERAL PROVISIONS**

41. Issuance of this Consent Order is intended to address the violations described herein. EPA reserves the right to commence action against any person, including Respondent, in response to any condition which EPA determines may present an imminent and substantial endangerment to the public health, public welfare, or the environment. Further, EPA reserves any existing rights and remedies available to it under the CWA, 33 U.S.C. §1311, et seq., the regulations promulgated thereunder, and any other federal laws or regulations for which EPA has jurisdiction. Further, EPA reserves any rights and remedies available to it under the CWA, the regulations promulgated thereunder, and any other federal laws or regulations for which EPA has jurisdiction, to enforce the provisions of this Consent Order, following its effective date (as defined below).

42. This Consent Order does not constitute a waiver or modification of the terms or conditions of VDOT's MS4 or general construction permit. Compliance with the terms and conditions of this Order does not relieve the Respondent of its obligations to comply with any applicable federal, state, or local law or regulation.

43. For the purposes of this proceeding, VDOT neither admits nor denies the factual allegations and conclusions of law set forth in this Consent Order.

44. Respondent waives any and all remedies, claims for relief and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this Order on Consent, including any right of judicial review pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

45. By entering into this Consent Order, VDOT does not admit any liability for the civil claims alleged herein.

**V. EFFECTIVE DATE**

This ORDER is effective after receipt by Respondent of a fully executed document.

SO ORDERED:

Date: 6/3/15

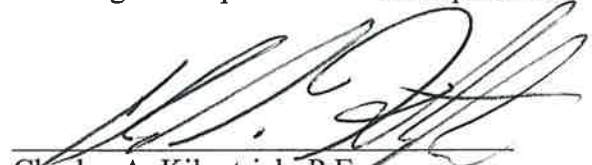
  
\_\_\_\_\_  
Jon Capacasa

Director, Water Protection Division  
U.S. EPA Region III

AGREED TO:

Date: 4/27/15

For Virginia Department of Transportation:

  
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Charles A. Kilpatrick, P.E.

Commissioner of Highways

Virginia Department of Transportation  
Docket No. CWA-03-2015-0085DN

CERTIFICATE OF SERVICE

I certify that on this date I caused to be sent by certified mail, return receipt requested, a copy of this "Administrative Order on Consent" to the following persons:

Ellen Porter, Esquire  
Senior Assistant Attorney General  
Virginia Office of the Attorney General  
900 East Main Street  
Richmond, Virginia 23219


And the original and a copy delivered by hand to:

Regional Hearing Clerk (3RC00)  
U.S. Environmental Protection Agency, Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

Additionally, I caused to be sent by first class mail a copy of this "Administrative Order on Consent" to the following persons:

Jerome Brooks  
Office of Water Compliance  
Virginia Department of Environmental Quality  
P.O. Box 1105  
Richmond, Virginia 23218

Date: June 8, 2015

  
Robert J. Smolski  
Senior Assistant Regional Counsel